A

KBB PROPERTIES SDN BHD

v.

YONG CHON CHIANG

B

HIGH COURT MALAYA, SHAH ALAM
ROSNAINI SAUB JC
[CIVIL APPEAL NO: MT3-12-225-2004]

C ***LANDLORD & TENANT:*** *Determination - Holding over - Claim for double rent - Appeal against - Whether there was holding over by appellant after expiry of termination notice - Whether there was element of willful conduct or contumacy on appellant's part - Whether sessions court judge erred*

D ***EVIDENCE:*** *Documentary evidence - Secondary evidence - Photostated copies - Whether weighed properly by Sessions Court Judge - Evidence Act 1950, s. 64 - Whether respondent made attempt to call makers of document - Absence of admissible documentary evidence - Whether respondent's claim for reinstatement costs allowed - Whether sessions court judge erred*

E

The appellant was appealing against the decision and judgment of the Sessions Court Judge whereby, *inter alia*, the appellant was ordered to pay the respondent double rent totaling RM819,000 for holding over a 3 storey premises ('the demised premise') F together with interest. The appellant was also ordered to pay costs of reinstatement of the demised premise amounting to RM53,292. By a tenancy agreement, the appellant (tenant) rented the demised premise from the respondent (landlord). *Vide* a letter, the appellant notified the respondent that they were terminating G the tenancy and the appellant was to vacate the demised premise on 31 December 1998. The appellant had sub-rented the demised premise to Kewangan Bersatu Berhad, its subsidiary, for the purpose of carrying out their business as a finance company. The demised premise had been renovated and included the installation H of an Automatic Teller Machine (ATM). However, when the appellant vacated the demised premise, it was not reinstated to its formal form and the ATM machine was not removed. The Sessions Court Judge had accepted the respondent's main contention that the appellant was a tenant holding over and ruled I that the appellant had not delivered vacant possession to the respondent. The Sessions Court Judge had premised her decision

to order payment of double rent primarily on the fact that the appellant had failed to remove the ATM machine. The issues that arose were (1) whether there was holding over by the appellant after the expiry of the termination notice and (2) whether the Sessions Court Judge had erred.

Held (allowing appellant's appeal with costs):

(1) The Sessions Court Judge had made an error in judgment in over-emphasising on the failure of the appellant to remove the ATM machine. She should have directed her mind to the fact that the appellant had physically vacated the demised premise and that the respondent had taken control and possession of it immediately after expiry of the appellant's notice of termination of the tenancy. The respondent had even placed additional locks at the demised premise. Therefore, the complaint of the appellant that they could not access the demised premise to do restoration work or remove the ATM machine was therefore not without merit. (paras 19 & 20)

(2) Whether or not there was handing over of keys was among one of the important and relevant factors to be taken into account when considering the issue of whether there was willful conduct on the part of the appellant to hold over the demised premise. In all probabilities, the keys had been handed over to the respondent or his representative since the appellant had already physically vacated the demised premise. Evidence that the keys to the demised premise were surrendered to the respondent's representative in the month of January 1999 and that it was the appellant who made the first attempt to contact the respondent to reinstate the demised premise were not given proper and adequate consideration. (paras 21 & 22)

(3) Prior to the filing of this suit the problem relating to the ATM machine was never specifically mentioned by either parties. Therefore, the respondent's reason for locking up the demised premise for fear of safety of the ATM machine was not only misguided and unfounded, but also more of an afterthought. The appellant had immediately ceased business after the expiry of the termination notice. It was unreasonable for the respondent to say that he feared for the safety of the ATM machine when the appellant as the owner of the machine had no such fear. (paras 22 & 23)

(4) The trial judge was clearly wrong when she held that as long as the ATM machine was not removed from the demised premise, there could be no delivery of vacant possession and the appellant was 'holding over' the demised premise. She had clearly misunderstood the meaning of 'holding over'. There must be element of willful conduct or contumacy on the part of the appellant in the holding over the tenancy of the demised premise. The non-removal of the ATM machine herein could not constitute, in law, to holding over. Similarly, the failure of the appellant to carry out restoration or reinstatement works to the demised premise in this case could also never be deemed in law to be holding over. The evidence showed that the appellant had physically moved out of the demised premise and immediately thereafter the respondent had taken control and possession of the same. (para 24)

(5) As could be seen from cl. 6.23 of the tenancy agreement, upon determination of the tenancy, the appellant was to yield the demised premise in good and substantial repair. The clause did not make it a condition precedent that the appellant was not entitled to yield the demised premise unless it removed all fixtures and machineries, which naturally included the removal of the ATM machine. The respondent therefore could not treat the appellant as tenant holding over just because the ATM machine was not removed after the tenancy had expired and claim double rent. (para 26)

(6) This court found that the appellant was facing difficulty in getting appointments with the respondent for purpose of gaining access to the demised premise in order to carry out restoration work since the same had been locked by the respondent. Therefore, there was unreasonable conduct on part of the respondent herein and that there was clear evidence of failure to mitigate. (para 28)

(7) As for the claim for the reinstatement's costs, the Sessions Court Judge had not properly and appropriately weighed all the available evidence produced. Firstly, SP2 was not the appropriate person to verify and confirm the payments to and issuance of the receipts by Chenton Industries Sdn Bhd. She was merely asked to keep them by the respondent. Secondly, the invoice and the receipts were strongly challenged by the appellant and they were photostated copies and were

therefore secondary evidence. Section 64 of the Evidence Act 1950 required that document to be proved by primary evidence *ie*, the original document itself. The respondent had not made any attempt at all to call the makers of these documents. Furthermore, the invoice was part of the non-agreed bundle where formal proof was required. The trial judge should not have admitted the document as evidence. In the absence of any admissible documentary evidence to support his claim for RM53,292 as reinstatement costs, the respondent's claim for this amount was thus not allowed. (paras 34 & 35)

[Setting aside judgment of Sessions Court Judge; deposit at the lower court to be refunded to the appellant.]

Case(s) referred to:
Chung Hwa Ying v. Phang Mun Mooi & Anor [1987] 2 MLJ 693 ***(refd)***
Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co Ltd [1982] LNS 69 ***(refd)***
Lee Wah Bank Ltd v. Afro-Asia Shipping (Pte) Ltd [1992] 2 SLR 93 ***(refd)***
Popular Industries Ltd. v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
Tay Lai Kiang & Ors v. Public Bank Bhd [1997] 5 CLJ 639 ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 28(4)(a)
Evidence Act 1950, ss. 64, 65(1)
Subordinate Courts Act 1948, s. 70(2)

Civil Law Act [Sing], s. 19(4)

For the appellant - M/s Rajes Hisham Pillai & Gopal
For the respondent - Victoria Martin & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Rosnaini Saub JC:

[1] The appellant (defendant in the court below) is appealing against the decision and judgment of the Shah Alam's Sessions Court Judge given on 9 March 2004 whereby, *inter alia*, the appellant was ordered to pay the respondent (the plaintiff in the court below) double rent totaling RM819,000 for holding over a

A 3 storey premises known as No. 15, Jalan SS 2/75, 47300 Petaling Jaya, Selangor (hereinafter referred to as 'the demised premise'), together with interest. The appellant was also ordered to pay costs of reinstatement of the demised premise amounting to RM53,292. The learned Sessions Judge's judgment was made B after a full trial.

[2] I am mindful of the fact that sitting in an appellate court, I have only the cold printed letters of the notes of evidence to read through while the learned trial judge had the advantage of hearing C the witnesses and observing their demeanors. In fact the learned counsel for the respondent has correctly reminded me on this matter in her submission. Nevertheless, an appellate court will in an appropriate case, interfere with the decision and findings of a trial judge if there is error or misdirection in law and in fact on D part of the trial judge or if he or she has come to a wrong conclusion on the facts. In this respect I refer to the case of *Chung Hwa Ying v. Phang Mun Mooi & Anor* [1987] 2 MLJ 693, where Syed Agil Barakbah SCJ at p. 604 said:

> E In normal cases, the appellate court is reluctant to interfere with the Judge's conclusion on the facts because as a trial Judge he has the opportunity to see and hear the witnesses and is in a better position to weigh their evidence. In the present appeal, however, he has failed to make proper use of this opportunity and has come to a wrong conclusion on the facts which in the F circumstances necessitate this Court to interfere and prevent a miscarriage of justice.

[3] I have read and considered in detail the appeal records and the submissions of both counsels together with the case G authorities in respect of this appeal. The facts of the case are actually as follows. The appellant was a tenant and the respondent was the landlord of the demised premise. By a tenancy agreement dated 5 June 1995, the appellant rented the demised premise from the respondent for an initial period of three H years, ie, from 1 May 1995 to 30 April 1998. The tenancy was then renewed and extended with a new rental rate of RM15,750 per month. This new extended tenancy period was supposed to be from 1 May 1998 to 30 April 2001 but *vide* a letter dated 24 September 1998, the appellant notified the respondent that they were terminating the tenancy with a three month's notice effective I from 1 October 1998 (hereinafter referred to as "the termination

notice"). So according to the termination notice the appellant was to vacate the demised premise on 31 December 1998.

[4] The appellant had sub-rented the demised premise to Kewangan Bersatu Berhad, its subsidiary, for the purpose of carrying out their business as a finance company. The demised premise was then renovated for the said purpose and this included the installation of an Automatic Teller Machine (hereinafter referred to as "the ATM machine"). The respondent was fully aware of this situation throughout the tenancy period.

[5] However, it is clear from the evidence that even though the appellant had vacated the demised premise on 31 December 1998, the demised premise was not reinstated to its formal form and the ATM machine was still not removed. In fact the ATM machine was only removed on 28 February 2001 and this after the respondent had filed this suit at the Sessions Court. I must say that having read though the evidence, especially the correspondences between the two parties, I am astonished that the parties were unable to come to a swift arrangement in removing the ATM machine and the reinstatement of the demised premise. It is a case of one party blaming the other for the problem confounding them.

[6] The respondent's claim can be categorized under two headings. Firstly, the claim for double rent or mense profit (as per para. 16.2 of the respondent's statement of claim), and secondly is for the costs of reinstatement (as per para. 16.3 of the statement of claim).

Claim For Double-Rent For Holding Over

[7] The learned Sessions Court Judge accepted the respondent's main contention that the appellant was a tenant holding over and ruled that the appellant has not delivered vacant possession to the respondent. She premised her decision to order payment of double rent primarily on the fact that the appellant had failed to remove the ATM machine and that it was reasonable for the respondent to lock-up the demised premise for fear of safety of the said machine. She also seems to accept the respondent's contention that the respondent had made reasonable attempts to get the appellant to remove the machine but the appellant had failed to do so. The learned Sessions Judge also made reference to the fact that the respondent is alleging failure of the appellant to give

occupancy ("penghunian") as opposed to vacant possession ("milikan kosong") and found that failure to remove the ATM machine means that the appellant has not given occupancy to the respondent. In short, the learned Sessions Judge held that as long as the ATM machine is not removed, there can be no vacant possession and the appellant is therefore holding over the demised premise. Applying the provisions of s. 28(4)(a) of the Civil Law Act 1956, she awarded the respondent the sum of RM819,000 being double rent from 1 January 1999 to 28 February 2001 (ie, the date the ATM machine was finally removed) for holding over the demised premise. This is equivalent to a period of 26 months double rent.

[8] A landlord's right to claim double rent against a tenant holding over has been given statutory recognition by s. 28(4)(a) of the Civil Law Act 1956, which provides as follows:

> s. 28 (4)(a) Civil Law Act 1956:
>
> Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.

[9] Further, s. 70(2) of the Subordinate Courts Act 1948 gave jurisdiction to the subordinate court to entertain the claim for rent and mense profits arising from the tenant holding over.

[10] In law, a tenant can only be said to be holding over if there is evidence of willful intent or conduct to prevent the landlord from obtaining possession of the premises after the tenancy has expired. In such a case the tenant is liable to pay double rent to the landlord. I also agree with the appellant's counsel's submission that the landlord's claim for double rent under s. 28(4)(a) of the Civil Law Act is penal in nature. In *Krishna Sreedhara Panicka v Chiam Soh Yong Realty Co. Ltd* [1982] LNS 69 (also at [1983] 1 MLJ 65) the majority view of the Federal Court held that double rent is actually damages which may be awarded at the court's discretion and it is penal in nature. Lee Hun Hoe CJ (Borneo) had this to say in respect of s. 28(4)(a) of the said act:

> The respondents' claim is actually not rent but a penal sum which the former tenant has to pay for the inconvenience and loss he causes the landlord in refusing to give vacant possession of the premises on the determination of the tenancy. The provision, being penal in nature, must be construed with some degree of stricture. In awarding damages the court always has a discretion.

[11] The Federal Court in *Krishna Sreedhara Panicka (supra)* then went on to hold that 'there must be something in the nature of contumacy on the part of the tenant in holding over to render him liable to double rent'.

[12] The learned counsel for the appellant referred to the case of *Lee Wah Bank Ltd v. Afro-Asia Shipping (Pte) Ltd* [1992] 2 SLR 93, a Singapore's Court of Appeal case, in his submission. In that case there was a clause in the tenancy agreement that the tenants were to yield the demised premises to the landlord upon the expiration or sooner determination of the tenancy, and to reinstate the same to their original state and condition at the tenants' own expense before the tenancy expired. The tenants are carrying the business as a bank at the demised premise and had installed vaults and strong room. At the end of the tenancy, the tenants had physically vacated the demised premises but the landlords only accepted the keys to the first floor and not the ground floor on the ground that the reinstatement works there were incomplete. The reinstatement works on the ground floor were only completed long after the expiration of the tenancy. The landlords sued the tenants for double rent pursuant to s. 19(4) of the Singapore's Civil Law Act. Section 19(4) of that Civil Law Act is in *pari materia* with our own s. 28(4)(a) of the Civil Law Act 1956. The landlords' claim was allowed by the High Court and the tenants appealed. The Singapore's Court of Appeal in allowing the appeal held as follows:

> 1. The expression 'holding over' in s. 19(4) of the Act requires an intention on the part of the tenant to refuse to deliver up the demised premises with knowledge that he has no right to remain in possession. The respondents must show that even after the expiration of their tenancy, the appellants continued to exercise a degree of possession and control over the demised premises which preclude the respondent from excluding them from the demised premises at their will.

2. There was no holding over of the demised premises after 1 December 1983. The appellant had vacated the premises and tendered the keys to the respondents by 1 December 1983. In so doing, they had yielded the premises in accordance with the tenancy agreement.

3. The respondents' proper claim in respect of uncompleted reinstatement works was not for double rent but for the costs of having to effect such works themselves. It was not a condition precedent that the appellants were not entitled to yield the premises unless they had reinstated them to their original state and condition.

[13] Our very own case of *Tay Lai Kiang & Ors v. Public Bank Bhd* [1997] 5 CLJ 639 reaffirmed the legal position in respect of the claim for double rent and the meaning of 'holding over' as laid down in the *Lee Wah Bank*'s case *(supra)*. It confirmed the proposition that the tenant must hold over willfully, ie, contumaciously, and not merely by mistake, or under a fair and reasonable claim of title. Abdul Malik Ishak J accepted the decision of *Lee Wah Bank*'s case and said, in the *Tay Lai Kiang*'s case, at p. 649 as follows:

> The Court of Appeal in *Lee Wah Bank Ltd* was of the view that there was no holding over of the demised premises because the covenant was to yield the demised premises and to reinstate the same to their original state and condition; it was not a condition precedent that the appellants were not entitled to yield the demised premises unless they reinstated the same to their original state and condition. The Court of Appeal also held that the expression "holding over" in s. 19 (4) of the Civil Law Act (Cap 43, 1988 Ed) requires an intention on the part of the tenant to refuse to deliver up the premises with knowledge that he has no right to remain in possession.

[14] Further at pp. 649 & 650, Abdul Malik, J in *Tay Lai Kiang*'s case *(supra)* continued as follows:

> It is interesting to note that *Black's Law Dictionary* by Hendry Cambell Black; M.A., sixth edn. at p. 731 defines the expression "hold over" to mean "to retain possession as a tenant of property leased, after the end of the term. To continue in possession of an office and continue to exercise its functions, after the end of the officer's lawful term". The same dictionary also defines the word "possession" as "having control over a thing with the intent to have and to exercise such control". The same dictionary also

defines the expression "vacant possession" as "an estate which has been abandoned, vacated, or forsaken by the tenant. The abandonment must be complete in order to make the possession vacant, and, therefore, if the tenant has goods on the premises it will not be so considered.

Thus, it can be argued that where premises vacated by the tenant with no intention "to have and exercise such control" as tenant, then it cannot be said the tenant was "holding over" the premises. It is my judgment that on both facts and law, there was no holding over of the premises by the defendant.

[15] It is therefore settled law that there must be holding over of the premises by the tenant before the landlord can claim double rent and that, to constitute 'holding over' there must be willful intent or contumacy on part of the tenant. The landlord (ie, the respondent in this appeal) must show that the tenant (ie, the appellant) has continued to exercise a degree of possession and control that prevented the landlord from taking possession of the demised premise after the expiration or determination of the tenancy.

[16] The critical question that needs to be answered in this appeal is that, based on the facts and evidence produced at the trial, was there holding over by the appellant after the expiry of the termination notice?

[17] It is not in dispute that the respondent has received and accepted the appellant's termination notice of the tenancy *vide* the letter dated 24 September 1998. It is also not in dispute that the appellant had physically vacated the demised premise on 31 December 1998, ie, on the date of expiry of the notice of termination. It can also be gathered from the evidence that immediately thereafter, ie, in the month of January 1999, the respondent went to the demised premise and put additional locks. It can also be safely concluded from the evidence that the appellant had ceased its business operation at the demised premise. However, the appellant had not reinstated the demised premise to the original state and condition and the ATM machine was not removed.

[18] The case for the respondent, and accepted by the learned trial judge, was that the failure of the appellant to removed the ATM machine tantamount to not yielding the demised premise. The respondent stated in evidence that he was unable to rent out

the demised premise because of the ATM machine. The learned trial judge also accepted the respondent's averment that the said ATM machine cannot be simply removed and it was reasonable on the part of the respondent to presume that the ATM machine may contain cash. The conduct of the respondent in locking the demised premise after the appellant had physically vacated the same was also deemed to be reasonable.

[19] I find that the learned Sessions Court Judge had made an error in judgment in over-emphasizing on the failure of the appellant to remove the ATM machine. She should have directed her mind to the fact that the appellant had physically vacated the demised premise on 31 December 1998 and that the respondent took control and possession of the demised premise immediately after expiry of the appellant's notice of termination of the tenancy. In fact as early as 8 January 1999, the respondent has decided to place additional locks at the demised premise. This is evidenced by the letter dated 8 January 1999 issued by the respondent's solicitors to the appellant. It is to be noted that in this letter nothing was mentioned about the ATM machine, which is, I think, understandable because the respondent at that time was merely asking for the keys to the demised premise in order to do 'a final inspection'. But as can be seen later, the respondent never brought out the issue of ATM machine until this suit was instituted.

[20] The respondent (PW1) in his testimony did not deny he had locked-up the demised premise after the termination of the tenancy but he however cannot positively remember when he did it. In all probabilities he did it at quite an early stage. Therefore, the complaint of the appellant that they could not access the demised premise to do restoration work or remove the ATM machine is therefore not without merit.

[21] There is some dispute as to whether the keys to the demised premise were handed over to the respondent or not after the tenancy has expired on 31 December 1998. The respondent denied ever receiving the keys but DW1, the then appellant's director, testified that the keys were handed over to the respondent's representative. The learned trial judge thought that this is not an important issue. I respectfully think otherwise. Whether or not there was handing over of keys is among one of

the important and relevant factors to be taken into account when considering the issue of whether there is willful conduct on part of the appellant to hold over the demised premise. In this case, in all probabilities, the keys had been handed over to the respondent or his representative since the appellant has already physically vacated the demised premise.

[22] The learned trial judge only gave consideration to the evidence of the respondent (SP1) but not that of the appellant's witness. Evidence that the keys to the demised premise were surrendered to the respondent's representative in the month January 1999 and that it was the appellant who made the first attempt to contact the respondent to reinstate the demise premise were not given proper and adequate consideration. By a letter dated 8 March 1999 the appellant wrote to the respondent requesting for access to the demised premise but there was no immediate reply. Instead of replying to the said letter, the respondent's solicitor sent a letter of demand dated 3 May 1999 alleging, *inter alia*, that appellant had failed to deliver vacant possession and, to quote from the letter, demanding 'holding over rental in arrears from January 1999'. The appellant responded with a letter dated 12 May 1999 to the respondent's solicitor denying the allegations. Then after a few more correspondences between the parties, the respondent filed this suit against the appellant in the Sessions Court. The respondent pleaded for the first time in his statement of claim about the appellant's failure to remove the ATM machine to form the basis of his claim against the appellant for double rent. It is observed that prior to the filing of this suit the problem relating to the ATM machine was never specifically mentioned by either parties.

[23] I therefore find that the respondent's reason for locking up the demised premise for fear of safety of the ATM machine was not only misguided and unfounded, but also more of an afterthought. The appellant had immediately ceased business after the expiry of the termination notice. I think it is unreasonable for the respondent to say that he feared for the safety of the ATM machine when the appellant as the owner of the machine has none of such fear. It was obvious that the ATM machine was no longer in use.

[24] The learned trial judge is clearly wrong when she held that as long as the ATM machine was not removed from the demised premise, there can be no delivery of vacant possession and the appellant was 'holding over' the demised premise. She had clearly misunderstood the meaning of 'holding over'. As can be seen from the case authorities I have referred to above, there must be element of willful conduct or contumacy on part of the appellant in the holding over the tenancy of the demised premise (see *Lee Wah Bank Ltd*'s case, *supra*, and *Tay Lai Kiang*'s case, *supra*). It is my considered opinion that the non-removal of the ATM machine in this case cannot constitute, in law, to holding over. Similarly, the failure of the appellant to carry out restoration or reinstatement works to the demised premise in this case can also never be deemed in law to be holding over. This is because the evidence shows that the appellant has physically moved out of the demised premise on 31 December 1998 and immediately thereafter the respondent has taken control and possession of the same.

[25] I agree with the learned counsel for the appellant that this case has similarity with *Lee Wah Bank Ltd*'s case *(supra)*, whereby there is a provision in the tenancy agreement that the tenant is to yield up the demised premise at the termination or determination of the tenancy and to reinstate the demised premise. Clause 6.23 of the tenancy agreement between the parties herein provides:

> The Tenant shall on the determination of the term hereby created yield up the demised premises and all fixtures fastenings matters and things thereto in anywise belonging or appertaining in such good and substantial repair as shall be in accordance with the covenants of the Tenant hereinbefore contained and with locks and keys complete but the Tenant may be entitled to remove all and any fixture or machineries belonging to the Tenant provided always that if any damage or defacement is caused, the Tenant shall make good the same failing which the Landlord shall be entitled to deduct the costs therefore from the Tenant's deposit paid pursuant to Section 4.01 above.

[26] As can be seen from cl. 6.23 above, upon determination of the tenancy, the appellant is to yield the demised premise in good and substantial repair. The clause did not make it a condition precedent that the appellant is not entitled to yield the demised premise unless it removes all fixtures and machineries, which naturally include the removal of the ATM machine. The

respondent therefore cannot treat the appellant as tenant holding over just because the ATM machine was not removed after the tenancy has expired and claim double rent. In my opinion the respondent should have carried out the removal work himself and claim the costs of doing so and loss of rental from the appellant. But instead the respondent is claiming double rental for holding over against the appellant, a remedy that has been held to be penal in nature. This is wrong. As Yong Pung How, CJ in *Lee Wah Bank Ltd*'s case *(supra)* said in his judgment:

> If the respondents were not satisfied that the appellants had reinstated the demised premises to their original state and condition, fair wear and tear excepted, they could have effected the reinstatement themselves and claimed the costs of doing so and the resultant loss of rent from the appellants. That was the extent of their claim against the appellants in this case. No such claim was made.

[27] The respondent, therefore, cannot refuse to accept vacant possession of the demised premise from the appellant at the determination of the tenancy merely on the ground that the ATM machine was not removed or that reinstatement works was not done.

[28] I repeat that the respondent never specifically at any time prior to the filing of this suit intimidated to or informed the appellant about his concern on the safety of the ATM machine. In the correspondences sent by his solicitors to the appellant, the respondent merely raised the issue of repair works. Those correspondences were contemporary documents and the respondent's testimony in court at the trial must be viewed and considered in the light of those contemporary documents. I also find that the appellant was facing difficulty in getting appointments with the respondent for purpose of gaining access to the demised premise in order to carry out restoration work since the same has been locked by the respondent. I therefore find that there was unreasonable conduct on part of the respondent in this case and that there was clear evidence of failure to mitigate.

[29] It is my judgment that, given the facts and circumstances of this case, the appellant can never be considered in law to be tenant holding over and therefore the awarding of double rent by the learned trial judge is clearly wrong. I therefore set aside the learned judge's award of double rent.

A **Claim For The Costs Of Reinstatement**

[30] As for the claim for the reinstatement's costs, the learned Sessions Court Judge seemed to have accepted the evidence of SP1 and SP2, photostated copies of the invoice (marked as exh. P2) and the various receipts (marked as exhs. P3 to P10) issued by a company known as Chenton Industries Sdn. Bhd. The invoice was dated 18 September 1999 itemizing the various works to be carried out to the demised premise totaling RM39,462. The receipts (exhs. P3 to P10) were for various payments allegedly made by the respondent to Chenton Industries Sdn. Bhd. from 28 April 2001 to 19 December 2001 totaling RM53,292. Perusal of the receipts showed that the payments were in respect of two things:

a. payment for renovation work totaling RM39,462;

b. payment for rubbish removal totaling RM13,836;

thus, making a total of RM53,292.

[31] It is the respondent's case in the court below that he had asked for quotation from several contractors to carry out restoration works on the demised premise. He chose Chenton Industries Sdn. Bhd. as the contractor because it can do the job faster. He produced a photocopy of the invoice dated 18 September 1999 from Chenton Industries Sdn. Bhd. The only other witness for the respondent in this case, PW2, is the personal assistant of the respondent and the receipts (exhs. P3 to P10) were produced as evidence through her.

[32] The learned trial judge accepted the invoice and receipts and awarded the respondent the RM53,292's claim.

[33] It is trite that reinstatement's costs are specific damages that must be strictly proved by the respondent. The respondent's counsel argued that the appellant has failed to bring evidence to challenge the respondent's claim for the reinstatement's costs and therefore the claim must be accepted by the court. With respect, I think it is for the respondent to prove its claim in this case that he had paid the total sum of RM 53,292 for reinstatement's cost and has to prove it with credible and admissible evidence.

[34] In my judgment the learned Sessions Court Judge has not properly and appropriately weighed all the available evidence produced at the trial. Firstly, SP2 is not the appropriate person to verify and confirm the payments to and issuance of the receipts by Chenton Industries Sdn. Bhd. She was merely asked to keep them by the respondent. Reading through the notes of evidence, I find that PW2 did not even know the breakdown of the payments made. Secondly, the invoice and the receipts were strongly challenged by the appellant and they are photostated copies and are therefore secondary evidence. The law governing the admissibility of documentary evidence is well established. Section 64 of the Evidence Act 1950 requires that document to be proved by primary evidence, ie, the original document itself. The exceptions to the rule are provided under s. 65(1) of the Evidence Act and 'the burden of proving the existence of any circumstances bringing the case within any of these exceptions lies upon the party seeking to adduce secondary evidence of the contents of the documents' – per Edgar Joseph Jr, J in *Popular Industries Ltd. v. The Eastern Garment Manufacturing Co. Sdn. Bhd.* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 636 at p. 646. In the present case under appeal, the respondent had not made any attempt at all to call the makers of these documents. PW2 had testified the respondent is a shareholder of Chenton Industries Sdn. Bhd. and therefore there is no reason at all why the respondent cannot call the maker or makers of these documents as witness or witnesses.

[35] Furthermore, the invoice (exh. P2) is part of the non-agreed bundle where formal proof is required. In fact the appellant's counsel had objected to Bundle F (the non-agreed bundle) that contained the invoice being tendered as evidence but the trial judge proceeded to admit and mark it as exhibit. In my opinion the learned trial judge should not have admitted the document as evidence.

[36] In the absence of any admissible documentary evidence to support his claim for the RM53,292 as reinstatement costs, the respondent's claim for this amount must therefore not be allowed.

A

Conclusion

[37] In the circumstances and having considered the evidence in this case, I hereby set-aside the judgment of the learned Sessions Court Judge and allow the appellant's appeal with costs. Deposit
B at the lower court is to be refunded to the appellant.

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